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In The Supreme Court of the United States

DONALD CARCIERI, ET AL.,
Petitioners,
v.
DIRK KEMPTHORNE, ET AL.,
Respondents

On Writ of Certiorari
to the United States Court of Appeals
For the First Circuit

BRIEF OF HISTORIANS FREDERICK E. HOXIE, PAUL C. ROSIER, AND CHRISTIAN W. MCMILLEN AS AMICI CURIAE SUPPORTING RESPONDENTS

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INTEREST OF AMICI CURIAE [*]

Amici are historians who have studied and written extensively about federal Indian law and policy, up to and including the twentieth century. This work has examined the Indian Reorganization Act of 1934, including the socioeconomic, cultural and political circumstances of its enactment and implementation, the statute's meaning and effect for particular tribes, and its place in the unfolding narrative of the Native American experience in the United States.

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[*]The parties have consented to the filing of this brief. Pursuant to Rule 37.6, amici curiae state that no party or counsel for a party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief, and no person or entity, other than amici or counsel, made a monetary contribution to the preparation or submission of the brief.

several addressing the implementation of the Indian Reorganization Act. His scholarly works include The Old System Is No Success: The Blackfeet Nation's Decision to Adopt the Indian Reorganization Act of 1934, 23 AM. IND. CULTURE & RES. J. 1 (May 1999); NATIVE AMERICAN ISSUES (2003); REBIRTH OF THE BLACKFEET NATION, 1912-1954 (2001); and SERVING THEIR COUNTRY: AMERICAN INDIAN PATRIOTISMS IN 20TH CENTURY AMERICA (forthcoming).

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As Justices of this Court have emphasized, "Even more than other domains of law, 'the intricacies and peculiarities of Indian law deman[d] an appreciation of history.'" South Carolina v. Catawba Indian Tribe, 476 U.S. 498, 511 (1986) (Blackmun, J., dissenting) (quoting Frankfurter, Foreword to A Jurisprudential Symposium in Memory of Felix S. Cohen, 9 RUTGERS L. REV. 355, 356 (1954)). In this brief, we gather historical evidence that may help the Court assess petitioners' central claim: that in enacting the Indian Reorganization Act (IRA) in 1934, the 73rd Congress intended to prevent the Secretary from exercising powers under the Act for the benefit of a tribe such as the Narragansett.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case concerns Section 5 of the IRA, the provision that authorizes the Secretary of the Interior "at his

discretion" to pursue various kinds of transactions "for the purpose of providing land for Indians" and then take title "in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired* * * ," 25 U.S.C. § 465.

In asking the Court to invalidate the trust land transaction here, petitioners do not dispute that the Narragansett qualify as a "tribe" under the definition section of the IRA, see id.§ 479 ("The term 'tribe' wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or [group of] Indians residing on one reservation") or the applicable departmental regulations, see 25 C.F.R. § 151.2(b). Nor do they dispute that the Narragansett enjoy a government-to-government relationship with the United States. More than a quarter century ago, the Secretary formally acknowledged the tribe, see 48 Fed. Reg. 6177 (1983) – an action that necessarily encompassed determinations that it comprises a distinct community and has existed, and maintained political influence or authority over its members, from historical times until the present. See 25 C.F.R. § 83.7.

Rather, petitioners maintain that Congress, in enacting the IRA, prohibited the Secretary from exercising the land acquisition authority for tribes whose formal federal recognition post-dated the statute's June 1934 enactment. This intent, petitioners argue, was expressed in language in the Act's definition section providing that

> [t]he term 'Indian' as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, who are descendants of such members who were, on June 1, 1934, residing within the present

> boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.

25 U.S.C. § 479. A restrictive reading of the Section 5 power, petitioners posit, "makes eminent sense," Governor's Br. 15, because the Act was adopted for the purpose of reversing the disastrous policy of allotting tribal lands – and because that policy had never been applied to the Narragansett (or other later-acknowledged tribes). Petitioners argue, alternatively, that Congress extinguished the Secretary's power to take lands into trust for the Narragansett by passing the Rhode Island Claims Settlement Act, 25 U.S.C. § 1701 et seq.

In this brief we do not address that alternative argument. Nor do we consider whether other later-enacted legislation affirmatively grants or confirms the Secretary's authority to take land into trust here, see Respondents' Br. 36-40, or the consequences that would ensue from adopting petitioners' reading. Rather, we confine our consideration to contentions that those responsible for the Act's passage in 1934 meant to disable the Secretary from applying it to later-acknowledged tribes; that the disputed Section 19 language was adopted for that purpose; and that this restriction was congruent with the statute's allotment-reversal aim.

In so doing, we do not minimize the difficulty of ascertaining the "intention" of any legislation, let alone determining how those who enacted it expected it to apply in circumstances they could not have foreseen; and we readily acknowledge that the IRA is hardly exempt from these difficulties. The Act, though understood at the time – and judged by history – to be one of the most important pieces of federal Indian legislation, was drafted and passed with limited debate and discussion; its

enactment history had numerous unusual aspects; like other, contemporaneous New Deal statutes, it conferred significant discretion on its Executive Branch administrators; and like many statutes in the field of Indian law, both the nature of the problems addressed and the law's intended operation were incompletely understood by many (likely most) of those who voted it into law.[1] Moreover, the individuals particularly responsible for the Act's passage – including Commissioner of Indian Affairs John Collier and Burton K. Wheeler, the Chair of the Senate Indian Affairs Committee – had divergent views about the ultimate aims of federal Indian policy (although there were important points of agreement, too) and were inclined to understand the Act's meaning through these different lenses.

That said, we find that the historical record contradicts the thesis that the 73rd Congress intended to deny benefits of the IRA generally, or Section 5 trust lands, in particular, to tribes that would later come under federal jurisdiction.

I. There is no historical evidence that those responsible for enacting the IRA intended it to effect a moratorium on the Interior Department's power to establish relations with tribes, nor is it plausible that they intended to deny the Act's benefits to later-recognized tribes.

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[1]The enactment history is detailed in ELMER RUSCO, A FATEFUL TIME: THE BACKGROUND AND LEGISLATIVE HISTORY OF THE INDIAN REORGANIZATION ACT (2000); see also GRAHAM D. TAYLOR, THE NEW DEAL AND AMERICAN INDIAN TRIBALISM: THE ADMINISTRATION OF THE INDIAN REORGANIZATION ACT, 1934-1945 (1980).

Petitioners' argument ignores an important feature of the Act: its fundamentally dynamic character. A central objective of the IRA, expressed in several of its most important provisions, was to provide a mechanism whereby Indians, including tribes with little recent contact with the federal government (and Indians who were not members of recognized tribes) could "organize." And it was widely understood that once organized, these tribes would be entitled to the full range of benefits the Act provides, including tribal trust land. In fact, those who drafted and enacted the law specifically intended the Secretary to acquire land for the benefit of then "landless" Indians, including bands and tribes that were not then under federal jurisdiction.

The implementation of the IRA confirms this understanding. In the years immediately after the law's enactment, the Office of Indian Affairs (OIA), under the leadership of Collier, the draftsman of the language petitioners rely on, repeatedly allowed tribes that would not have been viewed as "under federal jurisdiction" in 1934 to organize and reap IRA benefits, including trust land acquired under Section 5. Indeed, while the OIA's various decisions of this period are not always clear, they and the contemporaneous administrative regulations are inconsistent with the notion that a tribe's jurisdictional status as of June 1934 was controlling.

Equally telling were Congress's actions during this same period. Far from reasserting the restrictive purposes petitioners ascribe, Congress enacted legislation in 1936 applying the dynamic mechanism of the IRA to Alaska, with the avowed and undeniable intent of bringing previously unrecognized (and never-allotted, see infra) tribes within the Act's reach.

II. The only explanation petitioners advance for their reading is that it comports with a claimed congressional intent to limit the statute to those who had been harmed by the federal government's allotment policy.

But Congress had no such intent. Although growing awareness of the devastating effects of allotment was a catalyst to the legislative activity that culminated in the IRA's enactment, the suggestion that Congress meant for the IRA – or Section 5 – to benefit only those tribes that had been subject to the allotment policy is simply untenable.

The text and legislative history of the Act support no such limitation, and those responsible for its enactment clearly meant it to apply to non-allotted and allotted tribes alike. Consistent with that intent, all the Act's provisions (including Section 5) were promptly – and non-controversially – applied to tribes that had never been allotted.

Indeed, such a restriction "makes sense" only by ignoring the history that led Congress to enact the IRA and the broader policies it pursues. Rather than merely providing remedies for discrete historical injuries, Section 5, like other key provisions of the Act, was forward-looking, expressing a renewed governmental commitment to enabling tribes, whether or not allotted, to pursue economic development and at least a modicum of self-government.

III. Petitioners' far-reaching claims for the "plain language" of the Act's "Indian" definition are likewise rooted in misunderstanding.

As noted, what petitioners identify as the unambiguous import of the statutory language was not "plain" to Collier or congressional leaders at the time of

the IRA's enactment, and the claimed limitation was inconsistent with what they intended the Act to accomplish.

Indeed, the actual, disputed language does not suggest a tribal exclusion from the Act. It identifies classes of "persons" that "shall [be] include[d]" within the term "Indian," as part of a provision that includes a separate, broad definition of "tribe," and a statute that provides individual, as well as tribal benefits – and that uses both terms frequently and imprecisely enough that even petitioners cannot claim that each occurrence may be treated as a deliberate choice.

The distinction suggested in the text of Section 19 (and expressly echoed in Section 5's dual reference to "Indian tribes" and "individual Indians") is consistent with historic reality: those who drafted and debated the IRA viewed tribal and individual application as raising very distinct questions, warranting very different answers. While the key figures repeatedly discussed (and generally agreed on) the need to exclude highly assimilated individuals of Indian descent from the Act's coverage, discussions about the Act's application to tribes had a very different tenor, principally centering on whether such application would be compulsory (and whether special, parochial exclusions, urged by non-Indian interests, should be part of the Act).

Indeed, to the extent the discussion that prompted the adoption of the disputed "now * * * " language could be understood as addressing tribal application, the concern expressed was essentially the opposite of the one petitioners contend the language addresses, namely, that a tribe's status as of 1934 should not be conclusive under the Act. And it would, in any event, still require a large and doubtful leap to infer that Congress

specifically targeted tribes like the Narragansett for exclusion. As the Interior Department has authoritatively determined, they were recognized as a tribe in 1934, and its prior reluctance to provide federal services had been based on the (legally untenable) premise that, as "State Indians" they were outside the federal government's "guardianship" responsibility.

ARGUMENT

I. THE ENACTING CONGRESS DID NOT INTEND TO EXCLUDE LATER-RECOGNIZED TRIBES FROM THE IRA OR PROHIBIT THE SECRETARY FROM USING HIS DISCRETIONARY SECTION 5 AUTHORITY ON BEHALF OF SUCH TRIBES

Although petitioners are emphatic that the IRA must be read as having prohibited Section 5's application to tribes like the Narragansett, see Governor's Br. 17-23; Rhode Island Br. 21-29; Charlestown Br. 22-25, it is difficult to pin down with precision exactly what intention they ascribe, i.e., whether they contend Congress intended: (1) that no tribes would come under federal jurisdiction after the IRA's enactment; (2) that tribes would be recognized under federal jurisdiction after June 1934, but would be excluded altogether from the IRA's provisions; or (3) that such tribes would be subject to some of the IRA's provisions, but excluded from others, including the trust land provision of Section 5. Each proposition raises distinct, insuperable historical objections.

As for the first, it is altogether implausible that those responsible for the IRA intended it to constrict, let alone bring an end to, the federal government's longstanding practice of establishing and re-establishing relations

with particular tribes. The statutory language on which petitioners rely, providing that "'Indian'* * * shall include all persons * * * " would an be extraordinarily indirect way to say "no tribes shall hereafter come under federal jurisdiction" – especially in a provision that included a separate, broad definition of "tribe," compare 25 U.S.C. § 461 (upon enactment "no land of any Indian reservation * * * shall be allotted in severalty to any Indian"); cf. id. § 71 (after 1871, "[n]o Indian nation or tribe within the territory of the United States shall be [treated with]"), and any such claim would ignore the basic premises reflected in the IRA.

Although not all those responsible for the IRA shared the view of Commissioner Collier, who had been a prominent and outspoken champion of Indian rights before taking office, that tribal survival and self-government should be the ultimate aim of federal Indian policy, the IRA reflected widespread agreement that prior policies, which aimed at dissolving tribal relations, had been disastrous, and a central object of the Act was to establish a mechanism whereby tribes – including ones that were not yet federally recognized – could organize and thereby come under federal jurisdiction. Cf. Morton v. Mancari, 417 U.S. 535, 542 (1974) ("[t]he overriding purpose of [the IRA] was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically.").[2] Consistently with this intention, Section 16 of the IRA, which authorizes "any Indian tribe" to "organize for its common welfare," and to adopt a constitution, nowhere turns on whether the

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[2]See generally KENNETH R. PHILP, JOHN COLLIER'S CRUSADE FOR INDIAN REFORM, 1920-1954 (1977).

tribe was previously under federal jurisdiction, 25 U.S.C. § 476.

Nor can it credibly be suggested that Congress intended to consign newly recognized tribes to a jurisdictional limbo, wherein they could never benefit under the Act's other provisions. Such a theory would not only deny secretarially-acquired trust lands, but would make these tribes ineligible for forestry management plans and loans; deny their members employment preferences and educational benefits – and quite implausibly, leave later-recognized tribes subject to allotment. See 25 U.S.C. §§ 466, 470-72. We know of no one who advocated such a regime; the obvious premise of each of these provisions was that such benefits were vital to improving conditions for Indians, irrespective of how or when they came to be acknowledged by the federal government.

To read the claimed temporal limitation into Section 5 alone is perhaps the least plausible of all. The IRA's principal authors expected and specifically intended land to be acquired for tribes that were not then under federal jurisdiction. At the May 17 Senate Hearing, Commissioner Collier made clear his understanding that "wandering bands of Indians who have no reservation at all" would be "colonized" on "new reservations" acquired under the Section 5 authority, Hearing on S. 2744 and S. 3645 Before the S. Comm. on Indian Affairs, 73d Cong., 2d Sess. 241 (1934) (Senate Hearing), and Senator Wheeler expressly agreed that such Indians – almost none of whom were under federal jurisdiction at the time – would be settled on newly acquired lands, id.

Likewise, in a detailed, section-by-section analysis of the Senate and House versions of the Act, the Office of Indian Affairs endorsed the ultimately-enacted Senate

version of Section 7, because it made clear that "'lands acquired under this Act' would, without doubt be deemed reservation lands." It opposed the House's bill's alternative, on the ground that it risked being read to

> restrict, rather than extend the present federal jurisdiction [and] deny federal jurisdiction over Indians now landless and competent who take up residence on newly acquired federal lands.

U.S. Dep't of Interior, Analysis of Differences Between House Bill and Senate Bill at 6 (June 1934) ("OIA Analysis"), archived in the John Collier Papers (Microfilm), Sterling Mem. Library, Yale Univ., New Haven, Conn (emphasis added).

Finally, obtaining land for such Indians was of great import not only to Commissioner Collier and Senator Wheeler, but also to tribes themselves, whose support played an important role in securing the Act's passage. Because Indians had not been made aware of the bill's provisions, it received a decidedly mixed initial reaction in Indian country, with numerous tribes notifying Congress that they did not support the new measure. See RUSCO at 210-215. This unexpected reaction prompted an unprecedented response from the OIA: it convened ten congresses across Indian country in the winter and spring of 1934, attended by Collier and his staff, along with Felix Cohen and other attorneys from the Solicitor's Office of the Interior Department, with the aim of explaining the proposed measure, soliciting input and ultimately securing Indian support. See id. at 245-48. A concern raised repeatedly at these congresses was that the Act (and the land acquisition provision in particular) not exclude groups of landless Indians who were not then under federal jurisdiction. Collier and his colleagues regularly answered that the IRA would

provide a means for their future inclusion.[3]

Notably, petitioners point to no indication that Congress intended trust land to be restricted to a certain subset of recognized tribes. Nor (apart from its reference to "Indians," see pp. 26-32, infra) do they identify anything particular to the text of Section 5 that suggests such a restriction. On the contrary, that provision, which authorizes the Secretary "in his discretion[] to acquire * * * any interest in lands * * * within or without existing reservations * * * for the purpose of providing land for Indians" speaks in broad and comprehensive enough terms that petitioners challenged it, unsuccessfully, on "non-delegation" grounds, in the courts below. Pet. App. 57-59.

Indeed, the OIA was emphatic that the Section 5 language was not restrictive – and that it contemplated lands being acquired to settle "groups of landless Indians." In its section-by-section analysis, it explained:

> The purpose of [Section 5] is to protect Indian use of lands through tribal or corporate ownership. The use of the word "tribe" in this section is not intended to exclude ownership by groups of landless Indians settled on subsistence homesteads. Areas set aside for such homesteads are technically Indian reservations. The residents of such areas may be considered a "tribe" for purposes of tribal incorporation, etc., under the definition included in [Section 19]

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[3] See, e.g., THE INDIAN REORGANIZATION ACT: CONGRESSES AND BILLS 387 (VINE DELORIA, JR., ed. 2002) (describing Hawyard, Wisconsin congress).

OIA Analysis at 5.[4]

Although it is of course not possible to ascertain the subjective intent of individual protagonists, the actions taken by both the Executive Branch and Congress in the immediate wake of its adoption make clear that they did not understand the Act to have imposed the rigid restriction posited. From the inception, the Act was applied to – and trust land was acquired for – tribes that indisputably had not been "under federal jurisdiction" in June 1934, and regulations were promulgated that used "now" to mean the time of application, see Br. of Respondents 31 (citing examples). All this was done under the authority of Commissioner Collier, the individual responsible for the language on which petitioners rely.

Among the tribes that eventually organized under the IRA were groups that, in 1934, had not had formal relationship with the United States for many years, ones that had no resident agent (Saginaw Chippewa), groups whose reservation was virtually abandoned (Pojoaque), tribes that had no trust land (Bay Mills), and tribes that fit into all these categories (Western Shoshone).

Especially telling is the example of the Catawba Indian Tribe of South Carolina, which the Department allowed to organize under the IRA in 1944, see South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 502 (1986), but which was distinctly not "under federal jurisdiction" at the time the IRA became law, see id. at

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[4]Notably, as drafted by the OIA, and passed by House, Section 5 did not authorize acquisition of trust lands for "individual Indians." See OIA Analysis at 5. The focus, consistent with the statutory goal of giving Indian tribes the tools for effective self-government, was on providing land to tribes.

515 (Blackmun, J., dissenting).[5] By the 1930s, the Catawba, though maintaining their Indian identity and, by many measures, a recognizable tribe of Indians, had not had a relationship with the federal government for nearly a century. When they entered into the Treaty of Nation Ford with the government of South Carolina in 1839 (the legality of which was later challenged, see Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, Pub. L. No. 103-116), the federal government considered them under the jurisdiction of the state and not "wards" of the federal government. Just as he had refused to pursue the Narragansett's entreaties, see Charlestown Br. 7-9, the Commissioner of Indian Affairs had advised the Catawbas in 1906 and again in 1909 that the Interior Department would not seek relief on their behalf, on the ground that they were "'state Indians" for whom the United States had no responsibility." Catawba Indian Tribe, 476 U.S. at 515-16 & n. 4 (Blackmun, J., dissenting).[6]

In the May 17 Senate Hearing, Senators O'Mahoney and Thomas had specifically invoked the Catawba, with the former observing that they fell within the IRA's

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[5]See "Catawba Tribe-Recognition Under the IRA," 2 Solicitor's Opinions 1255 (Mar. 20, 1944).

[6]See H. Lewis Scaife, Catawba Indians of South Carolina: History and Condition of the Catawba Indians of South Carolina, Sen. Doc. 92, 71st Cong., 2d Sess. (1930); JAMES MERRILL, THE INDIANS' NEW WORLD: CATAWBAS AND THEIR NEIGHBORS FROM EUROPEAN CONTACT THROUGH THE ERA OF REMOVAL 226-275 (1989) (chronicling post-Treaty of Nation Ford history).

The Catawba were terminated pursuant to the Catawba Indian Tribe Division of Assets Act, Pub. L. No. 86-322 (1959), but a government-to-government relationship was reestablished by the 1993 legislation.

definition of "tribe" and stating he did not "know of any reason" for excluding them from the benefits of the Act, Senate Hearing at 266, asking "Why, if they are living as Catawba Indians, why should they limit them any more than we limit those who are on the reservation?" Id. Nor was it surprising that the Catawba would have come up in the forum. As this Court noted, a subcommittee of the same committee that considered the IRA had traveled to Rock Hill, South Carolina in 1930 and held hearings on the plight of the Catawba, with Senator Thomas reporting that the "subcommittee * * * found some hundred and seventy-five remnants of this band located on a tract of practically barren rock and gradually starving to death." See 476 U.S. at 502 n.7 (citing legislative history).[7]

D'Arcy McNickle, of OIA's Enrollment Committee, noted that the Catawbas appeared to:

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[7]Notably, Senator Thomas expressed his disapproval of the OIA's failure to take the Catawba under jurisdiction, observing that "the Government has not found out the live, apparently," Senate Hearing at 266, and both Senators' statements make clear that they read the Act's language as including the Catawba. See id.

If Senator O'Mahoney had been similarly familiar with the circumstances of the Narragansett, he could have made much the same point about them. They were, by many measures, a group of people recognized as Indians. Narragansett children attended federally run Indian boarding schools into the twentieth century; like many other tribes, the Narragansett had attempted to prosecute a claim asserting that their land had been taken unlawfully, a claim on which Congress held hearings in 1900; Narragansetts were counted on Indian Office censuses and on the federal census as late as 1930; and the State of Rhode Island granted them a state charter in 1934. See, e.g, Ethel Boissevain, Narraganset Survival: A Study of Group Persistence Through Adapted Traits, 6:4 ETHNOHISTORY 347-62 (1959).

> occupy a position identical with that of the Alabama and Coushatta Indians in Texas, who for years were refused government aid because they were not Federal Indians. Eventually, however, we were prevailed upon to cooperate with the State in helping those Indians, and last June they were permitted to vote on acceptance of the IRA.[8]

The Michigan Bay Mills Ojibwe Indian Community provides another example of the contemporaneous understanding of the Act. They had once been under federal jurisdiction, but by the early twentieth century the federal government had declared that Bay Mills land was "not technically a reservation" and that the Bay Mills Indians were no longer "wards of the government." The Indians living at Bay Mills were citizens, with no treaty rights and no recognized Indian government.[9] Nonetheless, reorganization efforts began in June 1935, one year after passage of the IRA. Commissioner Collier suggested, and the Bay Mills community agreed, that they should organize as "Indians residing on one reservation" – though that very land had been held not to be an Indian reservation by previous administrations. A question remained, however: What would become of the many Michigan Ojibwe people affiliated with the Bay

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[8]McNickle, "Memorandum to the Commissioner; Subject: Catawba Indians," published in H.R. Serial No. 103-34 (Hearing on H.R. 2399 House Subcomm. on Native American Affairs (July 2, 1993)) at 822. In the 1934 Senate Hearing (at 265), Senator Thomas had said of the Catawba, "they are not half bloods," later clarifying (at 266) "some presumably are half-bloods, but many are not."

[9]See CHARLES E. CLELAND, THE PLACE OF THE PIKE (GNOOZHEKAANING): A HISTORY OF THE BAY MILLS INDIANS COMMUNITY 34 (2004).

Mills community who lived elsewhere, having been scattered by various historical forces? The answer: organize the community living on or near the "reservation" and, once organized, amend the tribal constitution to admit these others to the tribe.[10] Thus, the Bay Mills community became a recognized Indian tribe under federal jurisdiction after the passage of the IRA in a fashion only possible after the passage of the Act. Likewise, the BIA actively encouraged Indians such as the Klallam and Nooksack, who were neither recognized nor under federal jurisdiction, to organize IRA governments.[11]

Further evidence of the contemporaneous understanding comes from the Western Shoshone of Nevada – a group with no land base (and thus no history of allotment, see infra). The Shoshone had not been under federal jurisdiction and were not a recognized tribe; they were a loose grouping of linguistically and culturally-related Indian peoples organized historically into bands. Using the IRA, the BIA created four new reservations in Nevada, see 25 U.S.C. § 467, and thereby formally recognized and took under federal jurisdiction four new Shoshone tribes.[12]

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[10]Ibid. at 70.

[11]See ALEXANDRA HARMON, INDIANS IN THE MAKING: ETHNIC RELATIONS AND INDIAN IDENTITIES AROUND PUGET SOUND 200-202. (1998); see also Lynn Arnold Robbins, Upper Skagit (Washington) and Gambell (Alaska) Indian Reorganization Act Governments: Struggles with Constraints, Restraints, and Power, 10:2 AM. IND. CULTURE & RES. J. 61-73 (1986).

[12]For this history, see Elmer Rusco, The Indian Reorganization Act in Nevada: Creation of the Yomba Reservation, 13:1 J. CALIFORNIA & GREAT BASIN ANTHROPOLOGY 77-94 (1991); Rusco,

The Western Shoshone experience illustrates the broad ambition of the IRA and the implausibility of the static, backward-looking construction petitioners urge. What gave these Indians "recognition" and placed them "under federal jurisdiction" was their becoming IRA-organized tribes.[13]

In those early, nearly contemporaneous decisions (and numerous others up to the present), the Interior Department did not treat a tribe's "jurisdictional status" as of June 1934 as decisive of its eligibility under the IRA. And the same can be said of the agency's administrative regulations adopted shortly after the Act's passage. See Respondents' Br. 30-31. Indeed, even in instances when the OIA declined an IRA application, the agency based its decisions on whether the Indians were a "tribe" at the time of application, not whether they were one in June 1934, id. at 32.

We do not read the 1936 Circular cited in respondents' brief (at 34-35), as to the contrary. That departmental guidance document does not purport to address the Act's definition of "tribe" or the application of Section 5 – or any other provisions of the statute that

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The Organization of the Te-Moak Bands of Western Shoshone, 25 NEV. HIST. SOC'Y Q. 175-196 (Fall 1982); Rusco, Formation of the Reno-Sparks Tribal Council, 1934-1939, 30 NEV. HIST. SOC'Y Q. 316-339 (Winter 1987); and STEPHEN J. CRUM, THE ROAD ON WHICH WE CAME: A HISTORY OF THE WESTERN SHOSHONE 91-99 (1994).

[13]Nor were these examples unique. Amicus NCAI identifies the Grand Traverse Band of Ottawa and Chippewa Indians, the Sault Ste. Marie Tribe of Chippewa Indians, the Cowlitz Indian Tribe, and the Poarch Band of Creek Indians (Alabama), as other instances of tribes accorded IRA benefits that would have been said to have been recognized or under federal jurisdiction in 1934.

reference tribes. Its subject was individual enrollment, and even with respect to individuals, the focus was the Office's administration of its responsibilities to those who were "Indians" under the Act by reasons other than tribal membership, i.e., by descent and (especially) "blood quantum." Although the Circular, unlike other OIA documents from the period, describes the first category with reference to "the date of the Act," it does not purport to define an exclusive or permanent class of eligible persons: As does the statute, it states that the "term 'Indian'" "shall include" various classes of persons. See id. ("if a person belongs * * * he is entitled to participate in the benefits of the Act* * * *").

As explained above, the Department's practice; the views of Collier and other principal supporters; and the fundamental purposes of the Act, all support the view that the Act was not, in fact, intended (and was not interpreted) to foreclose from IRA benefits tribes that came under federal jurisdiction after June 1934.

As respondents note (Br. 36), Congress has never disturbed or expressed disapproval of this understanding, and statutes enacted in ensuing decades both presuppose its correctness and likely prohibit the Department from adopting the interpretation petitioners urge. But at least as significant, only two years after enacting the IRA, Congress enacted the Alaska Reorganization Act of 1936, 49 Stat. 1250, which expressly provided that "Indians in Alaska not heretofore recognized as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district, may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under sections 470, 476, and 477 of this title." Id., §

1, codified at 25 U.S.C. § 473a.

Of course, the Alaska statute does not control the interpretation of the provisions of the IRA. But it is surely hard to reconcile claims that Congress intended the 1934 statute to rigidly exclude tribes, no matter how deserving or in need, that were not already under jurisdiction, with the 74th Congress's enactment, two years later (just as the IRA was being implemented) of provisions taking an aggressively forward-looking approach.

This sequence of events, we believe, combined with the repeated expressions of intent to use the IRA to bring under federal jurisdiction and acquire trust land for previously unrecognized groups, strongly refute petitioners' claim of specific, restrictive intent.

II. CONGRESS DID NOT LIMIT THE IRA TO ALLOTTED TRIBES

Petitioners repeatedly assert that Congress meant for the IRA – or Section 5 – to benefit only those tribes which had been subject to the allotment policy. Indeed, all the petitioners are insistent upon reading into the IRA this entirely implicit limitation. See, e.g., Rhode Island Br. 16 ("The purpose of the IRA was to terminate the allotment policy and to undo some of the damage it caused."); Governor's Br. 4 (stating that Section 5 was enacted "to provide land for those tribes and individual Indians that had been rendered landless by the allotment policy"); Charlestown Br. 6-7 ("The purpose of the IRA * * * was to return a land base to those tribes that lost or could have lost land through allotment; namely, those tribes that were previously federally recognized and under federal jurisdiction at the time of the Act."). These assertions are simply not historically tenable.

To be sure, growing awareness of the disastrous effects of the allotment policy was an important catalyst to the IRA's enactment, see RUSCO at 291; Hodel v. Irving, 481 U.S. 704, 707-08 (1987) (citing the conclusion of the influential 1928 "Meriam Report"). But we know of no evidence that anyone in Congress or the OIA favored (or even considered) limiting the Act's application to tribes that had been allotted, and the statutory text does not hint at such a restriction. On the contrary, the purportedly dispositive definition section itself provides that Alaska Eskimos – who did not have reservations and were never allotted – would be considered "Indians" for purposes of the Act and also extends "tribe[s]" to include "pueblo[s]," 25 U.S.C. 479, which were not subject to allotment. See, e.g., Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237, 253 n.28 (1985).[14]

Not only is the congressional discussion of acquiring trust land for "wandering bands," which had not previously had reservations, irreconcilable with an intent to help allotted tribes only (or even especially), but the historical record discloses that some in Congress had the exactly opposite intent of the one petitioners hypothesize. See RUSCO at 260 (noting that "during the legislative consideration of the bill, both the authority to adopt constitutions and two provisions dealing with incorporation applied only to reservations that had not

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[14]The New Mexico pueblos were of special concern to Collier, whose original interest and involvement in Indian policy had been sparked by his introduction to them, and who had championed their interests before Congress and the OIA for more than a decade before becoming Commissioner. See generally LAWRENCE C. KELLY, THE ASSAULT ON ASSIMILATION: JOHN COLLIER AND THE ORIGINS OF INDIAN POLICY REFORM (1983).

been allotted," but that these limitations were later dropped) (emphasis added).

Unsurprisingly, the Act's provisions, including Section 5, were applied immediately and non-controversially to tribes whose lands were never allotted. The 258 tribes that voted on the IRA between 1934 and 1936 included a number whose reservations had not been subject to federal allotment, and Commissioner Collier made a personal, concerted effort to urge the Navajo and other southwestern tribes that had never been allotted to take advantage of Act. See DELORIA, supra, at 404; PETER IVERSON, DINÉ: A HISTORY OF THE NAVAJOS 144-151 (2002). And as noted above, land was acquired under the IRA for tribes like the Western Shoshone, that had never been allotted. (Indeed in Nevada, New Mexico, and, Arizona, home to a number of tribes that organized under the IRA, only about 2% of tribal land – 542,066 out of a total of 25,199,250 acres – had been allotted by the end of the 1920s. See LEONARD A. CARLSON, INDIAN BUREAUCRATS AND LAND 147 (1981)).

An allotment-only limitation would have been entirely alien to those who enacted the IRA, and the thesis "makes sense" only to the extent one disregards the actual history, purposes, and design of the statute.

As the statutory text itself makes plain, allotment (and its consequences) were not all "the IRA was intended to remedy," Governor's Br. 15. The Act was enacted to respond to a constellation of problems facing Native Americans, which had numerous causes, of which federal land allotment policies were but one part. Thus, while the "Meriam Report" is widely credited with having raised awareness in Congress about the failures of allotment, only a small fraction of that report's 872

pages dealt with the subject. See L. MERIAM, INSTITUTE FOR GOVERNMENT RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION (1928). Both the broad array of social problems it documented and its reform proposals applied to non-allotted tribes and allotted ones alike.

Moreover, allotment was itself part of a broader set of governmental policies aimed at speeding the "assimilation" of American Indians, with the effect – and often the avowed purpose – of weakening tribal attachments and institutions. See United States v. Celestine, 215 U.S. 278, 290 (1909) (noting that policy was intended to "put an end to tribal organization"). Thus, the selling off of tribal land in "checkerboard" fashion was of a piece with numerous other practices that aimed to eradicate native religions, indigenous languages, and communal ownership of property, and to shift power from tribal leaders to government agents. See generally FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920 (1984).

Unsurprisingly, the IRA includes numerous provisions that have nothing to do with land or resources, see, e.g., §§ 469, 470; Respondents' Br. 22, and even petitioners presumably would acknowledge that those which address allotment most explicitly, sections 1 and 2, are forward-looking and intended to apply to tribal lands that had not, as of the 1934 enactment date, been allotted.

Even more important, to view Section 5 as a narrow remedy for a discrete, historically defined injured class misses something fundamental about the design and purposes of the IRA: its aim of re-orienting federal Indian policy generally in ways that respected and

encouraged tribes and tribal institutions. Although historians can and do argue about just how sharp and consequential a break with past practice the IRA represented (and those most responsible for the law's enactment would themselves have given different answers), the trust land acquisition provision was a critical element of the Act's policy of "'revitaliz[ing] tribal self-government." Mescalero Apache Tribe v. Jones, 411 U.S. 145, 151-52 (1973); see Mancari, 417 U.S. at 542. As John Collier and the OIA keenly understood, economic considerations were only a part of the reason for the Section 5 power: tribal lands had great religious, cultural, and political significance, as well, and, unlike fee ownership, the trust form was communal and perpetual, sending a powerful internal and external signal that tribes would endure, rather than whither away. Cf. Padraic McCoy, The Land Must Hold the People: Native Modes of Territoriality and Contemporary Tribal Justifications for Placing Land into Trust Through 25 C.F.R. Part 151, AMERICAN IND. L. REV. 422 (2002).

Finally, although no such distinction was intended, or even contemplated by the IRA, it would not make "eminent sense," Governor's Br. at 15, to restrict the Act to tribes that were rendered landless by lawful, if ill-considered, application of allotment statutes, while excluding tribes whose tribal identity and land base were eroded by removal policies or, as in the case of Narragansett, by illegal State action. See Narragansett Indian Tribe v. National Indian Gaming Comm'n, 158 F.3d 1335, 1336 (D.C. Cir. 1998) (describing State government's efforts to "extinguish [the Narragansett's] tribal identity"). See also 25 U.S.C. § 476(f) (amending the IRA to explicitly forbid the BIA – and all other "Departments or agencies of the United States" – from

"mak[ing] any decision or determination pursuant [to the statute]* * * that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes").[15]

III. PETITIONERS' UNDERSTANDING OF THE IRA'S DEFINITION SECTION IS NOT HISTORICALLY – OR TEXTUALLY – SUPPORTED

Apart from these efforts to hypothesize some reason why Congress would have excluded later-recognized tribes from trust lands, petitioners stake their claim almost entirely on the "plain meaning" of the IRA definition of "Indian," and, in particular, that the "now under federal jurisdiction" language added at the May 17, 1934 Senate Hearing should – or must – be understood as an exclusion of later-recognized tribes.

As explained above, neither the OIA nor Congress appeared to discern any such unambiguous instruction, and the restriction urged would have been inconsistent, in both specific and general ways, with what those who drafted the Act wanted it to accomplish. We believe the meaning petitioners ask the Court to impose on the particular language is very different from the one

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[15]The idea that only specific types of governmental wrongs warranted a response was rejected even in 1934. Senator Thomas objected strenuously to proposed statutory language explicitly preserving tribes' rights to pursue legal claims against the government for violating treaties, on the ground that it might be read as extinguishing the rights of Indians in his State, Oklahoma, who "had a lot of land taken from them" in accordance with treaties – ones consummated through "fraud, deceit, and collusion," Senate Hearing at 260-61. To accommodate this concern, the enacted version substituted more categorical language, see 25 U.S.C. § 475.

Congress intended.

Even taken on its own terms, petitioners' "plain language" contention is problematic. Section 19's actual wording identifies "members of recognized tribes now under federal jurisdiction" as among those "the term 'Indian' shall include" (emphasis added) – hardly an iron-clad prohibition on the Secretary's taking actions on behalf of others, especially given the use of more conventionally restrictive definitional language a few sentences later, see 25 U.S.C. § 479 ("the term 'tribe' wherever used in this Act * * * shall be construed to refer to any Indian tribe * * * ") (emphasis added).

Moreover, resort to grammatical principles such as the "rule of the last antecedent," Governor's Br. 33, does not seem a promising approach for understanding a provision which defines the term "Indian" by reference to "Indian tribe" and "Indian blood," and the term "tribe," with reference to "Indian tribe."[16] And treating Section 5's use of the plural word "Indians" as necessarily incorporating the limitation petitioners read in Section 19 leads quickly to results even they recognize Congress did not intend: for example, Section 1, which contains the same term, surely should prevent allotment of a later-recognized tribe's reservation.

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[16]Likewise, if the phrase "Indian tribe" in the "Indian" definition is given the same meaning as in the definition of "tribe," see Governor's Br. 21 (urging that identical statutory words be given the same construction) – i.e., as distinct from an "organized band [or] pueblo" – see id. (arguing that each word be given independent meaning),then the Secretary could not, on petitioners' theory, exercise IRA powers on behalf of a pueblo that was under federal jurisdiction in June 1934.

Even more important, it is hardly plain – or even likely – that Congress meant the disputed language to affect the Act's application to tribes, rather than just to "persons." Most IRA provisions concern either individuals, such as the employment preference and the educational loan provisions, see 25 U.S.C. §§ 471, 472, or tribes, id. § 466, 476, and those who enacted the IRA viewed tribal and individual application as raising very distinct concerns.

In the individual context, Congress and the OIA, echoing long-running (and still-ongoing) debates about Indian identity, individualism, and the nature and extent of the government's responsibilities, wrestled repeatedly with whether highly assimilated individuals should be entitled to the benefits – and subject to the "burdens," chiefly the restraint on alienation of individually-owned land – that came with legal "Indian" status. See Senate Hearings at 264 (Sen. Wheeler) ("Why should the Government * * * be managing the property of a lot of Indians who are practically white and hold office and do everything else, but in order to evade taxes * * * come under government control?"). Some Indian landowners testified against the Act on individualist grounds, and they (and Senator Wheeler) were successful in removing a provision that would have allowed tribes to reacquire previously allotted lands from nonconsenting individual owners, see RUSCO at 249; see also 25 U.S.C. § 468.[17]

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[17]Cf. Catawba, 476 U.S. at 503-04 (noting that "members of the Tribe desired an end to federal restrictions on alienation of their lands in order to facilitate financing for homes and farm operations"). Senator Wheeler's preference for a "one-half" blood quantum definition, see Senate Hearing 264-65, harkened back to allotment era policies that allowed "competent" Indians to sell real property without OIA permission, and later included a conclusive presumption

For his part, Commissioner Collier had little interest in applying the Act to individuals who were not members of tribes or living among fellow Indians, and the OIA opposed including "individual Indians," rather than just tribes, as beneficiaries of Section 5 land-into-trust transactions. See OIA Analysis at 5 (Indeed, as noted, the Circular discussed at pp. 19-20, supra was issued in fulfillment of the Office's statutory responsibility for identifying individual, "blood quantum" Indians who were not members of tribes).

The congressional discussion of tribal application was very different. Although questions of tribal power were sharply debated, see Senate Hearing 248-49 (discussing tribal power to assess members); see RUSCO at 249; the most frequently discussed issue of tribal application concerned whether tribes not wanting the IRA regime would be required to be covered – and was addressed in Section 18, which recognized a (somewhat ambiguous) "opt out" right. Much time was also consumed discussing particular exclusions sought for the benefit of non-Indian interests, some of which (i.e., ones championed by legislators whose support was needed for passage) were enacted into law.[18]

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of "competence" for individuals with less than one-half "Indian blood." See FRANCIS PAUL PRUCHA, THE GREAT FATHER (1984) 872-84.

[18]There was also a good deal of discussion about what percentages of votes should be sufficient under Sections 16 and 18, see Senate Hearing at 252-53, and about whether a tribe's voting against the IRA's application would make a member ineligible for individual benefits under the Act. The Senate also modified the definition of "tribe" by deleting language that would have extended the term to every "native political group or organization," out of concern that it would supply competing factions on a single reservation with means

The text of Section 19 preserves this distinction. It includes a separate definition of "tribe," and the "now under federal jurisdiction" language addresses which "persons" are "Indians." See supra.[19] Indeed, neither of the alternatives with which the "membership" criterion is aligned can meaningfully be applied to a group: tribes cannot be "descendants" of individuals, and, as practically difficult – and constitutionally problematic – as it is to ascertain "blood quantum," for individuals, it is that much more so to describe a group as having a particular blood quantum.[20]

To be sure, the hearing at which the "now under federal jurisdiction" language was added included discussion of the IRA's tribal as well as individual application, but what was said and transpired does not

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to advance claims to tribal assets. See id. at 254.

As Professor Rusco observes, debate over the "irrelevant question" presented by Senator Ashurst's support for non-Indian mineral exploration on a single Arizona reservation consumed much more time than most of "the much larger and more important questions dealt with in the proposed bill," RUSCO at 230-31.

[19]Notably, the OIA Analysis describes the "Indian" definition as operative for "purposes of the Act, e.g. preferences in Indian Service Employment, land, loan, and educational benefits" (p. 14) – without mentioning provisions applicable to tribes, such as Sections 16 and 18. And, as noted above, it expressly contemplates that the expansive "tribe" definition would operate under Section 5.

[20]We do not suggest that blood quantum was not or could not be considered in making decisions about tribes. Although it has dispensed with the inquiry in its modern acknowledgment rules, the OIA did consider "racial" Indianness, alongside political and ethnographic evidence, in deciding whether to accept IRA applications. But it was aware that applying a quantum cut-off on a group basis raised conceptual, as well as practical, difficulties.

support petitioners' account of Congress's intent. The "tribes" that prompted Commissioner Collier's proposal were ones that, by Senator Wheeler's account, were federally protected in June 1934, but should not have been – unnamed "Northern California tribes" who, the Senator said, were "at the present time * * * * under the supervision of the Government of the United States," though "no more Indian than you or I." Senator Wheeler urged that "sooner or later," "their lands ought to be turned over to them in severalty and divided up." The "date of enactment" restriction petitioners urge makes no sense as a way to get at that problem – indeed, it would require BIA to provide assistance to this group in perpetuity.[21]

Indeed, even if "future recognition" had been a concern, it would be fanciful to assert that the 73rd Congress meant to address the specific situation presented here: i.e., a tribe found to have been in continuous existence for hundreds of years, i.e., one that effectively has been determined should have been under federal protection in 1934. See General Accounting Office Report, No. GAO-02-49, Indian Issues: Improvements Needed in Tribal Recognition Process, Appendix I, at 24 (Nov. 2001) ("The essential

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[21]Although Senator Wheeler had, at an earlier point in the hearing, indicated an interest in excluding the Catawba from the Act's reach, Senator O'Mahoney had explained that their inclusion followed from the Act's "tribe" definition and that an exclusion – a result that both he and Senator Thomas made clear they would oppose – would require altering that definition, id. at 266, a step that the Committee (and Congress) did not take. When the "now under * * *" language was added, to the "Indian" definition, the discussion had moved on to a different – and evidently less controversial – concern of Senator Wheeler's, i.e., the "California Indians."

prerequisite for recognition is the tribe's continuous existence as a political entity since a time when the federal government broadly acknowledged a political relationship with all Indian tribes."); see 290 F. Supp. 2d at 180 ("there can be no serious dispute concerning the Narragansett's tribal status in 1934"); 48 Fed. Reg. at 6178 ("[T]he Narragansett community and its predecessors have existed autonomously since first contact, despite undergoing many modifications" and have a "documented history dating from 1614").

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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